Pauzi bin Jeman @ Fauzi bin Jeman v Dewan Bandaraya Kuching Utara

HIGH COURT (KUCHING) — SUIT NO 22–138 OF 2003–III
DAVID WONG J
1 NOVEMBER 2007

Employment — Contract of service — Termination with notice — Terms of employment contract — Whether termination unlawful — Whether employer entitled to terminate employee by giving a month salary in lieu of notice — Whether plaintiff had the right to be heard

Labour Law — Employment — Public servent — Termination — Whether termination wrongful — Whether plaintiff a public servant — State Public Service General Orders 1996

The plaintiff was employed by the defendant as an Assistant Enforcement Officer. Pursuant to a revised term of the employment contract, either party is entitled to terminate the contract of employment by giving each other a month's notice, or by paying a sum equivalent to one month salary in lieu of such notice. The plaintiff was terminated by the defendant, by way of letter of termination, without him being given a chance to be heard. The plaintiff sues the defendant for, inter alia, a declaration that the termination of the plaintiff is wrongful and/or illegal. The plaintiff alleges that he is a public servant and is therefore bestowed with constitutional rights under and by virtue of art 135(2) of the Federal Constitution. On the other hand, the defendant claims that contractually, the defendant is entitled to terminate the plaintiff's employment by giving one month notice or payment in lieu.

Held, dismissing the plaintiff's claim with costs to be taxed:

(1) The pivotal issue in this case was whether or not the defendant was a public servant. If the answer is in the affirmative, the plaintiff will be entitled to the relief claimed for on the ground that he was not afforded the right of a fair hearing as given to a public servant. However if the answer was in the negative, the plaintiff's case will be dismissed on the ground that his employment was lawfully terminated as opposed to dismissal pursuant to the contractual agreement entered between the plaintiff and the defendant (see paras 6–7).

(2) There was no any allegation in the statement of claim that the plaintiff was a member of the Sarawak Public Service and as such the State Public Service Commission Rules 1996 applied to the plaintiff. It appears that the plaintiff is basing his case on the terms and conditions contained in the Letter of Offer dated 7 August 1992. If that is the case, then surely his statement of claim is without merit as he had been given a month's pay in lieu of notice (see paras 8 & 10).

(3) The defendant had by virtue of The Local Authorities (Modifications of the State Public Service General Orders, 1996) Direction, 1998 adopted the State Public Service General Orders, 1996 but this adoption by the defendant did not make the plaintiff a public servant (see para 16).

(4) The State Public Service General Orders, 1996 which was made pursuant to the State Public Service (conditions of service) Ordinance, 1994 was distinct and separate from the Public Service Commission Rules 1996 which is set up pursuant to the art 37(3) of the Constitution of the State of Sarawak. As stated earlier the plaintiff must show that the Public Service Commission has power over the staff of the defendant and this he had failed to do (see para 18).

[Bahasa Malaysia summary

Plaintif telah diambil bekerja oleh defendan sebagai Pegawai Pembantu Penguatkuasa. Menurut syarat kontrak pekerjaan yang dikaji semula, mana-mana pihak berhak menamatkan kontrak pekerjaan dengan memberikan pihak yang lain sebulan notis, atau membayar jumlah yang bersamaan dengan satu bulan gaji sebagai ganti notis. Plaintif telah diberhentikan oleh defendan, melalui surat penamatan, tanpa memberikan peluang kepadanya untuk didengar. Plaintif telah menyaman defendan untuk, antara lain, satu perisytiharan bahawa penamatan plaintif adalah salah dan/atau tidak sah. Plaintif mendakwa bahawa beliau adalah seorang penjawat awam dan oleh itu diberikan hak-hak berpelembagaan di bawah dan menurut Perkara 135(2) Perlembagaan Persekutuan. Pada masa yang sama, defendan mendakwa bahawa dari segi kontrak, defendan berhak menamatkan pekerjaan plaintif dengan memberi satu bulan notis atau sebagai gantinya membuat pembayaran.

Diputuskan, menolak tuntutan plaintif dengan kos untuk ditaksirkan:

(1) Isu utama dalam kes ini adalah sama ada defendan adalah penjawat awam. Jika jawapannya adalah ya, plaintif berhak kepada relief yang dituntut atas alasan bahawa beliau tidak diberikan hak untuk pendengaran yang betul sebagaimana yang diberikan kepada seorang

penjawat awam. Walaubagaimanapun, jika jawapannya adalah tidak, kes plaintif akan ditolak atas alasan bahawa pekerjaannya telah ditamatkan secara betul tidak berupa pemecatan berdasarkan kepada perjanjian berkontrak yang telah dimasuki oleh plaintif dan defendan. (lihat perenggan 6-7).

(2) Tiada sebarang pengataan dalam pernyataan tuntutan bahawa plaintif adalah ahli Perkhidmatan Awam Sarawak dan oleh itu State Public Service Commission Rules 1996 adalah terpakai kepada plaintif. Didapati juga bahawa plaintif hanya bersandarkan kesnya kepada terma-terma dan syarat-syarat yang terkandung dalam surat tawaran bertarikh 7 Ogos 1992. Jika itu keadaannya, sudah pasti pernyataan tuntutan beliau adalah tidak bermerit memandangkan beliau telah diberikan bayaran untuk satu bulan sebagai ganti kepada notis (lihat perenggan 8 & 10).

(3) Defendan telah menurut The Local Authorities (Modifications of the Sate Public Service General Orders, 1996, Direction 1998 telah menggunapakai State Public Service General Orders, 1996 tetapi penggunaan oleh defendan ini tidak menjadikan plaintif sebagai seorang penjawat awam (lihat perenggan 16).

(4) State Public Service General Orders, 1996 dibuat menurut State Public Service (conditions of service) Ordinance, 1994 adalah berlainan dan berbeza daripada Public Service Commission Rules 1996 yang telah dibuat menurut kepada Perkara 37(3) Perlembagaan Negeri Sarawak. Sebagaimana dinyatakan sebelum ini plaintif hendaklah menunjukkan bahawa Suruhanjaya Perkhidmatan Awam mempunyai kuasa ke atas kakitangan defendan dan beliau telah gagal membuktikannya (lihat perenggan 18).]

Notes

For cases on termination with notice, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2201–2203.

For a case on public servant, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1065.

Cases referred to

Lee Hie Kui @ Eric Lee v Song Swee Guan & Anor [1997] MLJU 343 (folld)

Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361 (refd)

Zakiah Ishak v Majlis Daerah Hulu Selangor [2005] 4 CLJ 77; [2005] 6 MLJ 517 (folld)

Legislation referred to

City of Kuching North Ordinance 1998 s 8A
Federal Constitution arts 135(2), 132(3)
Perintah Am Negeri (Kelakuan dan Displin) 1966 s 153(4)(g) Chapter IV
Public Services Commission Rules 1996 s 2
Sarawak Constitution arts 17(l)(c), 37(3)
State Public Service General Orders 1996 s 55(1)

Ratanah Devi (Idris & Co) for the plaintiff.
Fam Boon Kim State (Legal Officer) (State Attorney Chambers, Sarawak) for the defendant.

David Wong J:

PROCEEDINGS

[1] The plaintiffs claims as per his statement of claim against the defendant are as follows:

(a) a decree and or a declaration declaring that the termination of the plaintiff's service is wrongful and or illegal;

(b) a declaration that the defendant's act in terminating the service of the plaintiff is *ultra vires* and or ineffective *in that plaintiff was dismissed without being given a reasonable opportunity to be heard* (amended with leave of the court on 30 October 2007);

(c) *a declaration that the defendant wrongfully and or unfairly dismissed the plaintiff without regard to his constitutional rights and or rules of natural justice or procedural fairness* (amended with leave of the court on 30 October 2007);

(d) special damages;

(e) pendente lite and future salary with interest lite date of payment;

(f) general and exemplary damages;

(g) costs.

[2] The plaintiff was at the material time employed by the defendant serving as an Assistant Enforcement Officer Grade N9 and / or 'PEMBANTU PENGUATKUASA GRED N9' since 6 July 1989. It is in evidence from the plaintiff himself that the employment relationship between the plaintiff and the defendant was governed by two documents which are tag 8 and tag 10 of exhibit A which read as follows:

DBKU/FP/53(34)

7 Ogos 1992

Kpl Fauzi bin Jeman @ Pauzi bin Jeman,

d/a Dewan Bandaraya Kuching Utara,

Melalui: Ketua Bahagian, Bahagian Penguatkuasa dan Keselamatan.

Tuan,

Tawaran Sebagai Pembantu Penguatkuasa N9 di Pejabat Datuk Bandar Kuching Utara

Sukacita dimaklumkan bahawa Datuk Bandar Kuching Utara bersetuju untuk menawarkan tuan jawatan seperti tersebut di atas mulai 16 Ogos 1992 dengan gaji permulaan sebanyak $470.00 sebulan dalam Jadual Gaji Gred N9:

P1T1 $470–P1T23 $1156

P2T1 $498–P2T23 $1228

P3T1 $527–P3T23 $1303

Perlantikan ini adalah tertakluk kepada syarat-syarat berikut:

(a) Tuan dikehendaki untuk berkhidmat dalam percubaan selama tiga tahun mulai 16 Ogos 1992. Sebelum tuan boleh disahkan dalam jawatan ini, tuan adalah dikehendaki untuk memberi perkhidmatan yang memuaskan, hadir dengan jayanya Kursus Induksi serta Lulus Peperiksaan Perkhidmatan yang ditetapkan oleh Datuk Bandar Kuching Utara. Sekiranya tuan gagal untuk mendapat pengesahan dalam jawatan dalam tempoh ini, maka tindakan akan diambil untuk menamatkan perlantikan tuan itu;

(b) Dalam tempoh percubaan tuan dalam jawatan ini, Datuk Bandar Kuching Utara boleh menamatkan perkhidmatan tuan dengan memberi sebulan notis ataupun membayar sebulan gaji tanpa sebarang sebab, dan dalam tempoh tersebut, tuan juga boleh meletak jawaan dengan memberi sebulan notis atau membayar sebulan gaji. Selepas tuan disahkan dalam jawatan, satu-satu pihak boleh memberi notis berhenti kerja selama 3 bulan atau membayar tiga bulan gaji sebagai ganti notis tersebut;

(k) Tuan hanya akan dipertimbangkan kenaikkan gaji tahunan ke peringkat yang tinggi berdasarkan kepada Laporan Penilaian Prestasi Tahunan tuan;

(l) Tuan mestilah lulus latihan khas Pegawai-Pegawai Penguatkuasa yang ditetapkan oleh Dewan Bandaraya Kuching Utara. Sekiranya tuan gagal mematuhi syarat-syarat latihan tersebut, makaperkhidmatan tuan boleh ditamatkan;

2. Bagi maksud mendapat akuan Doktor, tuan dikehendaki menjalani pemeriksaan kesihatan di Poliklinik Kerajaan. (Sila bawa surat pengenalan yang disertakan).

3. Jika tuan menerima jawatan ini mengikut syarat-syarat yang tersebut di atas, tuan adalah dikekendaki untuk mengisi dan menandatangani Surat Penerimaan Tawaran yang dikembarkan bersama-sama ini dan mengembalikannya dalam dua salinan berserta dengan surat Akuan Doktor kepad Dewan Bandaraya ini.

Sekian, terima kasih.

'BERKHIDMAT BERUSAHA BERBAKTI'

Yang lkhlas,

Surat asal ditandatangani oleh

(MOHD MORSHIDI ABDUL GHANI)

Timbalan Pengarah

(Pentadbiran, Kewangan dan Operasi)

bp Datuk Bandar Kuching Utara

sk Bahagian Kewangan

Bahagian Undang-Undang

DBKU/P/042/2 40

DBKU/FP/53(54)

11 JAN 1995

Encik Pauzi bin Jeman @ Fauzi bin Jeman,

d/a Dewan Bandaraya Kuching Utara.

Melalui: Ketua Bahagian,

Bahagian Penguatkuasa dan Keselamatan.

Tuan,

Tawaran Sebagai Pembantu Penguatkuasa N9 di Pejabat Datuk Bandar Kuching Utara

Merujuk kepada surat tawaran kami dengan tuan bil: DBKU/FP/53(34) bertarikh 7 Ogos 1992 mengenai perkara tersebut di atas, dimaklumkan bahawa Pihak Pengurusan Dewan Bandaraya Kuching Utara telah memutuskan untuk membuat pindaan kepada syarat dalam perkara '(b)' Surat Tawatan berkenaan seperti berikut:

Dalam tempoh percubaan tuan dalam jawatan ini, Datuk Bandar Kuching Utara boleh menamatkan perkhidmatan tuan dengan memberi sebulan notis ataupun membayar gaji tanpa sebarang sebab, dan dalam tempoh tersebut, tuan juga boleh meletak jawatan dengan memberi sebulan notis atau membayar sebulan gaji. Selepas tuan disahkan dalam jawatan, satu-satu pihak boleh memberi notis berhenti kerja selama satu bulan atau membayar satu bulan gaji sebagai ganti notis tersebut', Pindaan ini berkuatkuasa 1 Januari 1995.

Walau bagaimanapun, lain-lain syarat yang ditetapkan dalam Surat Tawarana tersebut adalah tidak berubah.

Sekian, harap maklum.

'MAKING TOTAL QUALITY WORK'

Yang Ikhlas,

Surat asal ditandatangani oleh

(SAADIAH HAJI ABDUL SAMAT)

Ketua Bahagian,

Bahagian Pengurusan Sumber Tenaga Manusia,

bp Datuk Bandar Kuching Utara.

[3] The plaintiffs service was terminated by the defendant by way of a Letter of Termination dated 27 November 2000 without him being given a chance to be heard as to why his services should not be terminated.

THE PLAINTIFFS CASE

[4] [4] Having read the submission of the plaintiffs counsel with care, the plaintiffs case can be summarized as follows:

(1) The plaintiff was a public servant.

On this point, learned counsel for the plaintiff, Ms Ratanal Dewi (Ms Dewi) submitted that the defendant was issued a show cause letter dated 24 October 2000 which inter alia states as follows:

> ... Tindakan saudara ini telah menunjukkan tahap disiplin yang tidak memuaskan dan ketidakpatuhan kepada peraturan di bawah s 153(4)(g) dalam IV (Kelakuan dan Displin) Perintah Am Negeri, 1966. Selaras dengan itu pihak pengurusan boleh mengambil tindakan tatatertib terhadap saudara. Sehubungan dengan itu saudara adalah diberi tempoh empat belas hari dari tarikh notis ini dikeluarkan untuk memberi tunjuk sebab mengapa tindakan untuk menamatkan perkhidmatan tidak boleh diambil ke atas saudara.

Because of the reference to s 153(4)(g) Chapter IV (Kelakuan dan Displin) Perintah Am Negeri, 1966 by the defendant in the termination letter, the plaintiff had been treated by the defendant as a public servant. She further submitted that pursuant to s 2 of the Public Services Commission Rules 1996 and s 8A of the City of Kuching North Ordinance 1998 the plaintiff is deemed a public servant. The aforesaid sections respectively state as follows:

> Public Officer' or 'Officer' means any persons holding permanently or temporarily any appointment in the public services and includes any person appointed to perform official duties in the public service
>
> Public service 'means the public service of the State of Sarawak
>
> (Section 2 of Public Services Commission Rules 1996)

And

> The Commissioner, all Members, the Directors and all officers and employees of the Commission shall be deemed to be public servants within the meaning of the Penal Code ' (Section 8 A of the City of Kuching North Ordinance 1998)

And as a public servant he is bestowed with constitutional rights under and by virtue of art 135(2) of the Federal Constitution which states as follows:

> No member of such service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard

Since it is not disputed that the plaintiff had not given a fair hearing, the defendant had breached the plaintiffs constitutional right making the termination of the plaintiffs service with the defendant unconstitutional and invalid.

(2) The termination clause stated in the amended letter of offer (Tag 10 exh A) is unfair and/or unreasonable in failing to give adequate protection to the plaintiff as an employee.

(3) The termination clause which states that the plaintiff could be terminated without stating reason and by giving one months salary in lieu of notice is manifestly unjust and in favor of the defendant and is designed to oust the rights of the plaintiff as an employee.

DEFENDANT'S CASE

[5] Learned counsel for the defendant, Ms Fam Boon Kim ('Ms Fam'), at the end of plaintiff s case elected to submit a no case to answer which in substance contended that the relationship between the plaintiff and the defendant was governed by the letters at Tag 8 and Tag 10 of exh A. Central to that relationship is the right of either party to terminate the contract of employment by giving each other a month's notice. Ms Fam also submitted that the defendant was never a public servant and hence he was not entitled to be given the right of hearing before his services were terminated or in another words, the principle of natural justice does not apply to a circumstance where the parties' employment relationship is governed by a

contract. For this contention, she relied on art 132(3) of the Federal Constitution and the case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 (FC) and *Lee Hie Kui @ Eric Lee v Song Swee Guan & Anor* [1997] MLJU 343.

DECISION OF THE COURT:

[6] In my view, the pivotal issue in this case is whether or not the defendant was a public servant. If the answer is in the affirmative, the plaintiff will be entitled to the reliefs claimed for on the ground that he was not afforded the right of a fair hearing as given to a public servant.

[7] However if the answer is in the negative, the plaintiffs case will be dismissed on the ground that his employment was lawfully terminated as opposed to dismissal pursuant to the contractual agreement entered between the plaintiff and the defendant as per tag 8 and tag 10 of exh A.

[8] Firstly, let me state here that I have perused the plaintiffs statement of claim with care and with respect I could not find in it any allegation that the plaintiff was a member of the Sarawak Public Service and as such the State Public Service Commission Rules 1996 applied to the plaintiff. One would have thought that if that was the main plank of the plaintiffs case that would have been expressly set out in the statement of claim. Not only was there such an omission, the plaintiff in para 3 of the statement of claim specifically states as follows:

> By a Letter of Offer dated 7 August 1992 (tag 8 of exh A) the defendant had offered the plaintiff to serve as an Assistant Enforcement Officer Grade N9 and/or 'PEMBANTU PENGUATKUASA GRED N9' in the defendant's establishment. The plaintiff had duly accepted the terms and conditions of the defendant's Letter of Offer. The plaintiff will refer to the terms and conditions of the said Letter of Offer dated 7 August 1992 for its full terms and effect at the hearing and trial of this action.

[9] This is a blatant admission on the part of the plaintiff that he was bound by terms and conditions set out in documents in tag 8 and tag 10 of exh A. This averment is backed up by the plaintiffs evidences when he was cross examined. This is what transpired in court.

Q: Refer to Q28 of PW1–A. Do you agree with me that this letter constituted the terms and conditions of your contract of service with the defendant?

A: Yes.

Q: Refer to Q30 of PW1–A. Do you agree with me that this letter constituted a variation to the terms and conditions of your contract of service with the defendant?

A: Yes, I agree.

Put:That you agreed to the variation of the terms and conditions of your contract of service with the defendant Do you agree?

A: Have to look at the letter first

Q: Refer to tag 10 of exh A. Do you agree?

A: I agree.

Q: Refer to Q31 of PW1–A. Do you agree with me that by this letter (tag 10 of exh A), the defendant may terminate your employment by giving one month notice or by paying a sum equivalent to one month salary in lieu of such notice?

A: I agree.

Q: Do you agree with me that the variations contained in tag 10, exh A was accepted by you?

A: Yes. That is what the letter says.

[10] From the above, it appears that the plaintiff is basing his case on the terms and conditions contained in the Letter of Offer dated 7 August 1992. If that is the case, then surely his statement of claim is without merit as he had been given a month's pay in lieu of notice. Further I am bound by the decision of the Court of Appeal in to their decision in *Zakiah Ishak v Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77; [2005] 6 MLJ 517, where the facts as per the law report were these. The plaintiff there commenced an action in the High Court claiming for a declaration that the termination of her services or dismissal was null and void and that she was still in the employ of the defendant; arrears of salary and damages. Her claim was dismissed on appeal and the Court of Appeal held, inter alia at p 77g per Arifin Zakaria JCA:

> The terms and conditions of the plaintiff's employment were contained in the letter of offer which clearly stated that her employment was on a contractual basis for the period of one year. Clause 9 of the formal contract of employment also made it clear that the defendant had the right to terminate the plaintiffs services upon giving her a three- month notice in writing or one month's salary in lieu of such notice. The learned judge thus was right in holding that the termination of the plaintiff's contract of employment was I accord with the defendant's rights under cl 9 thereof. The motive or reason for the termination was strictly a matter for the defendant as the employer. The plaintiffs contract of employment was terminated; she was not dismissed. There was, therefore, no necessity to afford her an opportunity of being heard…

A And further, at p 78c:

> The fact that there were allegations of misconduct (indiscipline and/or insubordination) made against the plaintiff did not preclude the defendant from terminating the plaintiff's contract of employment (*Government of Malaysia v Lionel* [1973] 1 LNS 37; [1974] 1 MLJ 3 followed).

B

[11] To add to the confusion, the plaintiff in the later part of the statement of claim talks of unfair dismissal, breach of the principle of natural justice and his constitutional right of a fair hearing. When asked by the court on what C basis is the plaintiff making these allegations, Ms Devi could not afford any explanation. And in my view neither do the averments in the statement of claim offer any explanation.

D **[12]** These inconclusive or conflicting pleadings in my view are enough for this court to dismiss the plaintiffs claims.

[13] However since Ms Devi had in her submission contended that the plaintiff should be treated as a public servant, I feel that I should give the E same my due consideration.

[14] A case on point is that of *Lee Hie Kui @ Eric Lee v Song Swee Guan & Anor* [1997] MLJU 343 where Ian HC Chin J meticulously dealt with this issue. The facts as per the law report were these. While being the Mayor of F the City of Kuching South, the first respondent ('Song') had accepted nomination as a candidate to contest the State Constituency seat of Padungan, Sarawak, and subsequently went on to win the election. The petitioner, the losing candidate, sought to declare Song's election invalid and in consequence filed the present petition wherein he argued that Song, G at the time of his nomination, was holding 'an office of profit', and that being so, was barred from contesting the election by art 17(l)(c) of the Sarawak Constitution. He further contended that the Council of the City of Kuching South ('the Council') is in law a 'public service' of Sarawak, thereby making the Mayor's office 'an office of profit'. His Lordship in his judgment discussed H the relevant legislations and cases in detail on the issue of who is a public servant in the state of Sarawak and this is what he said:

> In my view, to qualify as a 'public service' that service must come under the purview of the State Public Service Commission which has been set up by the I Sarawak Constitution to overseer the public services with power to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over the members. The Public Service Commission had not been shown to have such power over the members or staff of the Council of the City of Kuching South and therefore the Council of the City of Kuching South cannot be a 'public service '. This brings me to the second

question. Dr Das had argued that whatever the nature of the office of the Mayor of the City of Kuching South, that office had been excluded from the definition of 'public service' by art 44 (2)(b) of the Sarawak Constitution which exempts 'a member of any council established by or under any law' from the definition of 'public service'. This article reads:

(2) In this Constitution references to an office in the public service shall not be construed as including references to the office of —

(a) Yang di-Pertua Negeri, Chief Minister or other Minister or Assistant Minister or member of the Majlis Mesyuarat Kerajaan, Speaker or other member of the Dewan Undangan Negeri, a member of the Commission, a member of the Pardons Board constituted for the State under the Federal Constitution, the President of the Majlis Islam, the Mufti, or any Headman as defined in the Local Authority Ordinance; or

(b) save in so far as the Legislature may by law prescribe, a member of any council, board, panel, committee or other similar body (whether incorporated or not) established by or under any law.

Learned counsel did not say whether the exclusion clause of art 132(3)(d) of the Federal Constitution should not apply. Mr Thomas, on the other hand, argued that the Sarawak Constitution article is inapplicable and that instead the exclusion clause that should apply is art 132(3)(d) of the Federal Constitution, which for ease of reference, the relevant part is again reproduced:

(d) the office of member of any Commission or Council established by this Constitution or any corresponding Commission or Council established by the Constitution of a State; or

and, learned counsel further submitted, since the City of Kuching Ordinance that established the Council of the City of Kuching South was neither established by the Federal Constitution nor by the Sarawak Constitution, as required by art. 132(3)(d) of the Federal Constitution, the exclusion clause cannot be called in aid by Song.

In my view, by the manner of the categorization, that is referring to the various Federal public services, it is clear that art 132 is not intended to define or provide the definition of what the public service of each state' is because it is a matter under the domain of each state and this has been made clear in art 132(2) of the Federal Constitution, quite apart from it being a state matter within the exclusive competency of the state to legislate. Thus, when art 132(3)(d) of the Federal Constitution states the exclusion clause, it is stating the exclusion in

> relation to the Federal public services and not of the State public services. That being the position, the definition and exclusion clause of art 44(2)(b) of the Sarawak Constitution ought to apply. Mr. Thomas has rested his argument on the applicability of the Federal Constitution Article, which if he had succeeded would not have excluded the Council of the City of Kuching South from being a 'public service'; however, I have ruled otherwise with the result that learned counsel did not argue that the word 'council' in the Sarawak Constitution Article cannot include the Council of the City of Kuching South which I will take as having been conceded that it does. In any event the words are too plain to admit of argument otherwise.

[15] I fully endorse the statement of law stated by His Lordship and applying the same to the present case, I find that the plaintiff cannot be treated as a public servant.

[16] In respect of the submission by Ms Devi that the reference in the show cause letter dated 24 October 2000 to s 153(4)(g) Chapter IV (Kelakuan dan Displin) Perintah Am Negeri 1966 meant that the plaintiff was treated as a public servant, I agree with the oral reply given by Ms Fam who conceded that the defendant had by virtue of The Local Authorities (Modifications of the State Public Service General Orders, 1996) Direction, 1998 had adopted the State Public Service General Orders 1996 but submitted that this adoption by the defendant did not make the plaintiff a public servant and relied on the case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 (FC) where the learned Federal Court Judge Peh Swee Chin at p 370A held that:

> In our view, the position is that the incorporation of such General Orders into the supervisor's contract of service does not have the legal effect of making him a holder of any of such public office as categorized under art 132 of the Federal Constitution...

[17] Furthermore she relied on s 55(1) of the State Public Service General Orders 1996 which states as follows:

> Notwithstanding other provisions of these General Orders, the Government may terminate the service of an officer, unless the officer has been granted pensionable status, by giving him a notice in writing inconformity with his terms of appointment or, if no notice is provided in his terms of appointment, by giving him one month notice or one month's salary in lieu of notice

[18] Let me also stress here that the State Public Service General Orders, 1996 which is made pursuant to the State Public Service (conditions of service) Ordinance 1994 is distinct and separate from the Public Service Commission Rules 1996 which is set up pursuant to the art 37(3) of the

Constitution of the State of Sarawak. As stated earlier the plaintiff must show that the Public Service Commission has power over the staff of the defendant and this he had failed to do.

[19] For all the reasons stated above, I dismiss the plaintiffs claims with costs to be taxed unless agreed to the defendant.

Plaintiff's claims dismissed with costs to be taxed.

Reported by Brendan Navin Siva